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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1418

UNITED STATES OF AMERICA,
Respondent,

versus

WALTER H. JOHNSON,
Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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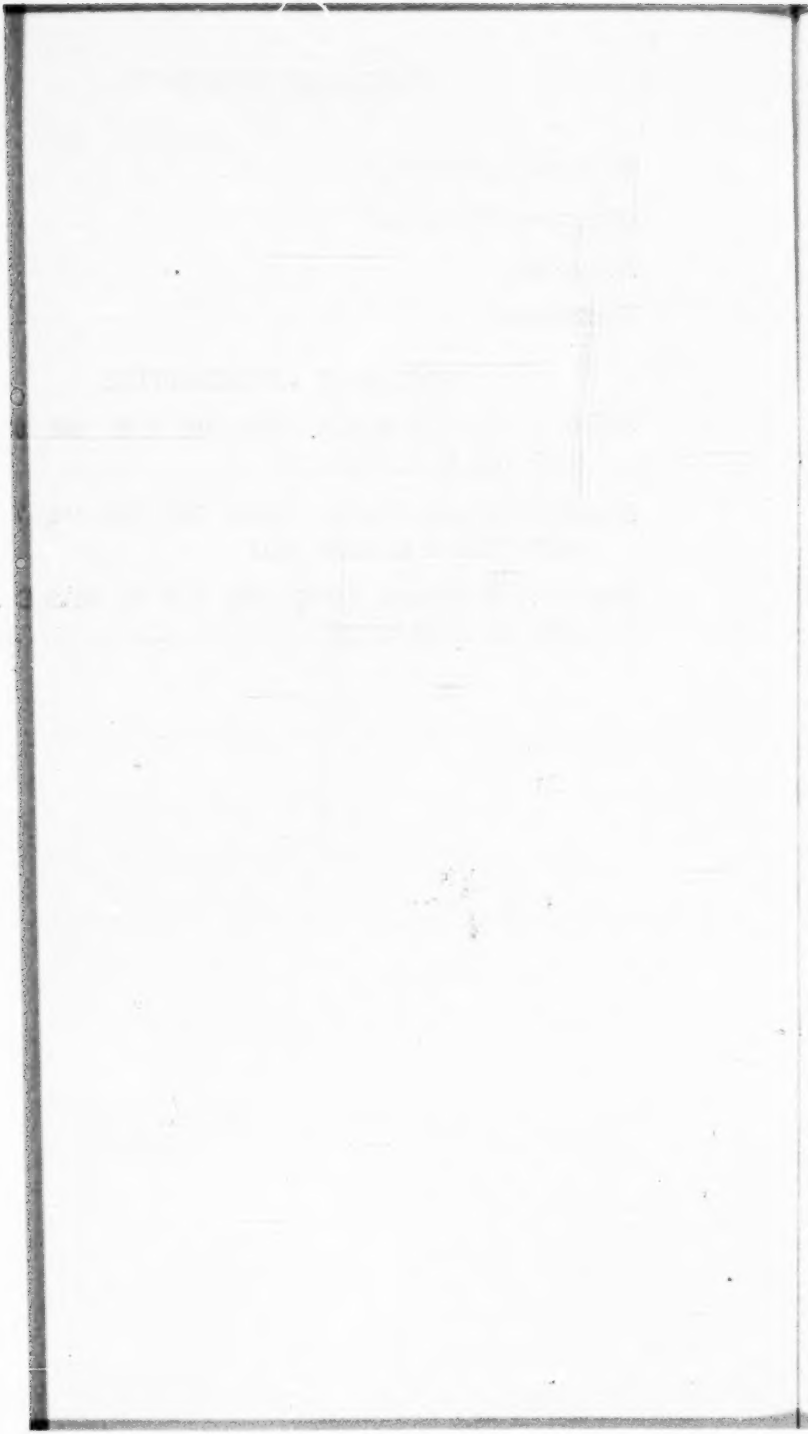

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To the Chief Justice and Justices of the Supreme Court of the United States.

The petitioner, Walter H. Johnson, prays that a writ of certiorai issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

The opinion of the court below in the case has been reported at 487 f 2d 1318 (1974). (Appendix A)

The judgment of the Court of Appeals was entered on January 11, 1974. A timely petition for rehearing

was denied on February 20, 1974. This Court's jurisdiction is under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner, Walter H. Johnson, was tried on a six count indictment for mail and securities fraud and conspiracy, violations of 15 U.S.C.A. 77g(a), 18 U.S.C.A. 1341, and 18 U.S.C.A. 371. Also indicted and named as co-defendants were Charles Parker and William Campbell. Only petitioners Johnson and Campbell were tried. Campbell was acquited and petitioner, Johnson, was convicted. The chief witness for the government was co-defendant, Charles Parker, who prior to trial entered a plea of guilty to one of the six counts, conspiracy to commit the other five. The remaining five charges against Parker were not dismissed as of the date of petitioner's trial. During cross examination of Parker the following occurred.

> MR. DYMOND: [Attorney for appellant's co-defendant]: "Mr. Parker, am I correct in understanding — you are sitting there under oath now — you are telling me you have no understanding as to the intended dismissal by the Government of the first five counts of this indictment against you?"
>
> MR. PARKER: "I am telling you I have no deal with the Government. I pleaded guilty to a count that carries a five year prison term and $10,000 fine."

MR. DYMOND: "Have you been led to believe by anybody that the remaining counts are going to be dismissed against you?"

MR. PARKER: "I have led by nobody about anything."

MR. DYMOND: "If you don't know what is going to happen to those other five counts, what are you doing testifying?"

MR. PARKER: "My attorney advised me to do this and I did it exactly as he advised me."

MR. DYMOND: "You wouldn't say you are doing this through a sense of rightousness?"

MR. PARKER: "I did it because my attorney advised me to do it as I testified before."

MR. DYMOND: "Did your attorney tell you the remaining five counts were to be dismissed against you?"

MR. PARKER: "My attorney did not."

MR. DYMOND: "Has anybody told you that?"

MR. PARKER: "I don't recall anybody telling me that."

MR. DYMOND: "You don't have any doubt you would recall that if it was told you, do you, Mr. Parker?"

MR. PARKER: "I don't believe I have any doubt."

MR. DYMOND: "Would you definitely and unequivocably state nobody told you these five counts would be dismissed against you?"

MR. PARKER: "No, sir, I have not been told."

THE COURT: "There were no plea bargains made by this Court and I specifically asked Mr. Parker whether anyone connected with the Government, or anyone else, including his attorney, had made any promises, or threats, or inducements, coercion, or anything of that nature, to cause him to enter a plea guilty."

MR. DYMOND: "If the Court please, I would like to call on the Government right now to inform the Court whether an agreement has been made to dismiss the remaining five counts against Mr. Parker."

MR. PERKINS: "The answer is 'No'."

That a deal had been struck between Parker and the Government is no longer in controversy. The government now admits that a bargain had been reached

to dismiss the remaining five counts for Parker's plea and testimony against Johnson and Campbell. The Fifth Circuit held that under the above facts, Johnson "would clearly be entitled to a new trial under *Giglio v. United States*, 1972, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d. 104."

F. Irvin Dymond represented Mr. Campbell, petitioner's co-defendant, and knew from a pre-trial interview with Parker's attorney, Jerome Winsberg, that a deal with Parker had been reached as to the five counts pending against him. The bargain was that the five pending counts would be dismissed for Parker's honest testimony. (There is no question that the trial judge was not a party to the bargain as to dismissal of the five counts or as to any sentence which might be imposed on the conspiracy count to which Parker had pleaded guilty).

Immediately following the above quoted exchange between Mr. Dymond, the witness Parker, and the government trial attorney, a recess was called and government and defense attorneys held a recorded conference *in chambers*, whereupon the bargain was reluctantly admitted by two government attorneys, one of whom had been at counsel table when Parker denied the bargain, in the presence of the jury. See footnote 6, 487 f 2d. 1318 (1974).

The trial was resumed, and during the presentation of Campbell's defense, Jerome Winsberg, who had represented Parker, testified *as a defense witness*. Winsberg totally refuted Parker's testimony as to the exis-

tence of the bargain, 478 f 2d 1818 at 1323, which all parties, including the Fifth Circuit, *now* accept as the truth, *and that Parker had knowledge* of the bargain when he testified.

Prior to the trial judge's instructions to the jury, the only testimony before the jury concerning the bargain was Campbell's false testimony, corrobated by the government's express denial of such a bargain, as well as the silence of other government counsel aware of the facts, and the truthful testimony of Parker's former attorney, Jerome Winsberg. At no point did the jury ever hear an express admission from the government that its chief witness had lied concerning the bargain.

The trial judge twice instructed the jury "that inducements to testify are to be considered in determining credibility, and he did so specifically in the context of plea bargaining." 487 f 2d. 1318 at 1324. There was further government reference to the bargain and it occurred during the prosecution's closing rebuttal argument. It is as follows:

> "Ladies and gentlemen, defense counsel contend Parker is not to be believed because he says he didn't consider it much of a deal to be facing five years in prison and a ten thousand dollar fine and because he said his attorney never told him the other five counts would be dismissed. Let us face it. Defense counsel called his attorney, Judge Winsberg, as a wit-

ness. Judge Winsberg confirmed what Parker had said."

The above quoted remarks are referred to by the Fifth Circuit as a tacit acknowledgment by the government of the existence of the bargain. 478 f 2d 1318 at 1324.

Johnson was convicted. Parker was sentenced to prison and while incarcerated was deposed, and acknowledged among other things that he knew of the existence of the bargain. 478 f 2d 1318 at 1324.

The Fifth Circuit remanded to the trial court for an evidentiary hearing to resolve two issues, neither of which goes to the heart of the prosecutorial misconduct described above.

QUESTIONS PRESENTED

1. It is incumbent upon the government to disclose the existence of a bargain made with a chief witness where the witness has falsely denied its existence, particularly where defense counsel has demanded disclosure; and

2. Where the government has falsely and expressly denied the bargain, and at no point in the trial admits to the jury the bargain, can a *defense* witness called to refute the lie cure the prosecutorial misconduct?

ARGUMENT

The Court of Appeals has watered down the guidelines of this court established in *Giglio v. United States*, 1972, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104, and in *Napue v. United States*, (1959), 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 and in *Brady v. Maryland*, (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, (1963).

The facts in the case now before this court set out circumstances more reprehensible than those of the above cited cases. Here, the government was faced with the dilemma of hearing its chief witness, Parker, lie as to questions put to him relative to plea bargaining, and then, of either having to admit to the jury and the court that the bargain did exist and that the chief witness was committing perjury *or* support the falsehood and attempt to salvage the witness; the government knowingly chose to support the perjury. There can be no explanation or interpretation of the following:

> MR. DYMOND: "If the Court please, I would like to call on the Government right now to inform the Court whether an agreement has been made to dismiss the remaining five counts against Mr. Parker."
>
> MR. PERKINS: "The answer is 'No'."
>
> MR. DYMOND: "As to whether any suggestion that will be done has been made to the attorneys, to Parker or anyone else?"

> MR. PERKINS: "We haven't talked to Mr. Parker about this matter at all. Mr. Walter is the United States Attorney and he talked to Mr. Parker's counsel about this matter. His name is Winsberg. He had a discussion with him about this case. When I saw Mr. Parker, I saw him in the courtroom when he entered a plea and I didn't have any discussion with him at all."

Moreover, as noted by the Fifth Circuit, another government attorney, sat, in silence, at counsel table, and permitted Parker's lie to stand.

The Court of Appeals distinguishes *Giglio* and *Napue*, on the following points:

> A. The government expressly admitted the bargain in chambers, but not before the jury;
>
> B. Parker's perjured testimony was refuted by his attorney, Jerome Winsberg, *called as a defense witness*;
>
> C. The Trial Judge instructed the jury that inducements to testify are to be considered in determining credibility;
>
> D. The government *tacitly* admitted the bargain in rebuttal argument.

A. The jury is entiled to know of the plea bargain and the defendant is entitled to a candid disclosure

by the government of the existence of the bargain, particularly when called upon to acknowledge the true facts.

B. Winsberg, called as defense witness, did truthfully refute Parker's perjured testimony, but in the absence of governmental disclosure and honesty, his testimony simply created a jury question: Should the jury believe Parker, as corroborated by the government, or Winsberg.

C. In light of the jury question created by the conflicting testimony of Parker and Winsberg, the instructions of the trial judge do not cure the prosecutorial misconduct but merely invites the jury to resolve an issue which the government should have conceded in the first instance.

D. The alleged *tacit* admission of the government quoted herein above is not an admission in any form, but rather another effort by the government to support Parker's perjured testimony. Winsberg did not corroborate Parker's testimony as to the plea bargain, he refuted that testimony.

Although the Fifth Circuit condemn the misconduct and dishonesty of the government attorneys, 487 f 2d 1318 at 1324, it permits such conduct in the context of the facts of this case, which facts appear to us to be more reprehensible, as we have already stated, than those found in the landmark cases quoted above. Our understanding of guidelines set out *Giglio, Napue and Brady*, is that the government my not constitutionally

obtain a conviction on perjured testimony, and when such testimony is tendered it must be, with candor and honesty, be repudiated *before the jury, the triers of the facts*, by the government. Prosecutorial candor and honesty are not to be found in this case.

Therefore, we pray that the writ issue and that the conviction of the petitioner be reversed, or alternatively, that he be granted a new trial.

Respectfully submitted:

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CERTIFICATE

I certify that I am a member in good standing of the Bar of the United States Supreme Court and that I have mailed, postage prepaid, copies of the foregoing petition to the United States Attorney for the Western District of Louisiana, Shreveport, Louisiana, and to the Solicitor General of the United States, Department of Justice, Washington, D. C., this ____ day of March, 1974.

Cecil M. Burglass, Jr.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appelle,
v.
Walter H. JOHNSON, Defendant-Appellant.
No. 73-1225.

United States Court of Appeals,
Fifth Circuit.
Jan. 11, 1974.

* * * *

Before TUTTLE, BELL and GOLDBERG, Circuit Judges.

BELL, Circuit Judge:

The result of this disjointed and to some extent obfuscated appeal is an affirmance in part and a remand in part for determinations on two matters. The first is whether a key prosecution witness' post-trial deposition warrants a new trial on grounds of newly discovered evidence. The second is whether prosecutorial misconduct suggested by the deposition actually occurred, and if so whether it accords appellant the right to a new trial.

In a jury trial appellant was found guilty of mail and securities fraud[1] in his activities as principal

[1]The indictment charged violations of 15 U.S.C.A. § 77g(a), 18 U.S.C.A. § 1341, and 18 U.S.C.A. § 371.

salesman of the promissory notes of Professional Service Corporation (P.S.C.).[2] It is largely uncontroverted that he sold some $4 million of these securities over an eleven-year period, that he received over $750,000 for his efforts, and that he made grossly erroneous representations to potential investors. His primary defense was that he lacked the requisite scienter, in that he was unaware of P.S.C.'s insolvent and profitless condition. This defense was attacked most directly by Parker, a co-defendant turned government witness, who testified to appellant's familiarity with P.S.C.'s finances and to his knowing participation in the production of fraudulent sales literature. In August, 1972, five months after the trial, Parker recanted[3] his testimony, claiming that he had perjured himself under the "programming" of government agents, and that he had done so in order to preserve a plea bargain relieving him of all but one count of his own six-count indictment. Appellant then filed a motion for judgment of acquittal, and supplemented an earlier motion for a new trial. On September 1, 1972, the trial court denied each motion and imposed sentence. In February, 1973, some five months after this appeal was filed, appellant filed three additional motions, for a new trial, to vacate judgment, and to recuse the trial judge from consideration of these motions. The grounds asserted were that

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[2]Appellant's co-defendant, who had been P.S.C.'s attorney as well as an officer, director, and stockholder, was acquitted by the same jury.

[3]We will consistently refer to Parker's "recantation," or to his having "recanted." In so doing we do not suggest that he has disclaimed all or even large portions of his testimony. As will be developed below, he has directly and specifically challenged very little of what he stated at trial.

Parker had been indicted for perjury and that the judge had displayed prejudice. These motions also were denied and appellant's brief incorporates his appeal from their denial into this appeal from the original post-trial rulings.

I.

[1] We will initially dispose of the three motions filed in 1973. When a case is on appeal the trial court has no jurisdiction to entertain such motions. United States v. Warren, 2 Cir., 1972, 453 F.2d 738, 744; United States v. Brown, 2 Cir., 1964, 335 F.2d 170; Rule 33, F.R.Crim.P. Thus the trial court's order denying these motions must be vacated.

[2, 3] The proper procedure for obtaining judicial consideration of post-appeal motions is to move that the circuit court remand for good cause shown. Cf. Beckwith v. United States, 10 Cir., 1966, 367 F.2d 458, 461. In order to prevent repetitive rulings, we have treated the post-appeal motions as directed to this court in accordance with accepted procedure. We find that they raise no grounds for post-trial relief that were not raised in the original post-trial motions.[4] Thus they

---

[4]The original post-trial motions raised the claim that Parker's testimony was perjured. The only additional material in the post-appeal motions to vacate judgment and for a new trial was the fact that Parker's recantation had resulted in a perjury indictment. However, this indictment specifies as acts of perjury not his testimony at appellant's trial, but rather his subsequent testimony that he had, under government "programming," perjured himself at the trial. Thus, by indicting Parker the government in no way vouched for the claim, presented to the trial court and, by appeal, to this

are wholly insufficient to justify remand for further trial court consideration. Cf. Horne v. United States, 4 Cir., 1931, 51 F.2d 66.

II.

[4] As for the original post-trial motions, the motion for judgment of acquittal was not timely filed. See Rule 29(c), F.R.Crim.P. Thus on remand the district court should vacate its order and dismiss the motion for want of jurisdiction.[5] See Rowlette v. United States, 10 Cir., 1968, 392 F.2d 437, 439.

The trial court's denial of the original motions for new trial is properly before this court. We will first deal with three issues raised in the motion filed shortly after the jury verdict. We will then consider the more difficult issues raised by the subsequent motion based on the newly discovered evidence contained in Parker's recantation.

[5] Appellant contends his right to counsel was violated by arraignment without counsel. This contention

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court, that appellant's conviction was the product of perjured testimony and government misconduct.

As for the motion to recuse the trial judge from consideration of the post-appeal motions, it does present new material, but it is mooted by our disposition of the motions to vacate judgment and for a new trial.

[5]We note that while this disposition of the motion for judgment of acquittal deprives appellant of a potential remedy on this appeal, it does not limit the scope of our review of the proceedings below. This is because the motion for judgment of acquittal raised no contentions not also raised in the motions for new trial.

is without merit. The arraignment was a perfunctory proceeding at which the judge entered an automatic plea of not guilty as to all defendants and allowed sixty days for further pleadings. Appellant was offered appointed counsel but declined the offer because he wished to retain a lawyer on his own. In addition, appellant was accompanied at arraignment by his brother, a lawyer. Finally, no objection to the arraignment procedure was made until almost two years later, after trial had commenced.

[6] Appellant also contends that the prosecution deliberately suppressed certain documentary evidence tending to impeach Parker's credibility. Involved are four checks, payable to appellant, on which Parker had forged appellant's endorsement. This contention is without merit for several reasons. First, nothing suggests the government was responsible for the checks being unavailable — they were somewhere among several truckloads of documents involved in P.S.C.'s bankruptcy proceedings; while known to appellant throughout the criminal proceedings, he did not subpoena them until after the trial commenced. Second, appellant was not harmed by his inability to introduce the checks into evidence, inasmuch as Parker admitted before the jury that he had made such forged endorsements (he explained that he had done so with appellant's permission).

[7] The final point on appeal from the initial motion for new trial concerns the trial judge's participation by way of anecdotes, rambling stories and questioning of witnesses. The only specific incident dis-

cussed in appellant's brief concerns the judge's analogy to a case tried by his father in which a former Louisiana governor, Richard Leche, was convicted of mail fraud. While we do not endorse this potentially prejudicial method of explaining the law to a jury we note that the matter arose in the limited context of the nature of the intent to use the mails required by the mail fraud statutes — a matter as to which there was no factual dispute in this case. The trial judge did not otherwise suggest that appelant's case was like Leche's and we cannot conclude that denial of the motion for new trial was an abuse of the trial court's discretion.

[8] Appended to appellant's brief is an affidavit in which his trial attorney lists other rambling anecdotes, and also charges the trial judge with visible bias and improper participation in the questioning of witnesses. Since this affidavit is not part of the record, and since it is argumentative and conclusory, we will treat it not as factual material but as part of the brief. Despite its charges of bias and prejudice, nowhere does it direct us to specific points in the record where the trial judge behaved improperly, where objections to his comments were made, or where objections were made to omissions by the court reporter of the judge's comments. Noting further that the charge to the jury was entirely correct and unbiased, and that it clearly delineated the judge's role in the fact-finding process, we conclude that denial of the motion for new trial on these grounds was not erroneous.

II.

Appellant's primary attack on his conviction is contained in the supplement to his original motion for new trial. It is based on Parker's testimony and subsequent recantation, and on the prosecution's conduct with regard to that testimony. We understand his claim to be two-fold: first, that the new evidence created by the recantation justifies a new trial; and second, that a similar result should follow from each of three instances of possible prosecutorial misconduct, two alleged in Parker's recantation, and the other apparent on the face of the record. Before turning to the recantation, we will consider the last-mentioned instance of questionable conduct. To do so it is necessary to more fully develop the facts involved.

Parker was the primary promotor of P.S.C., and had been indicted on six counts of mail and securities fraud. Shortly before trial he agreed to plead guilty to one count with the understanding that the remaining counts would be dropped if he testified fully and truthfully against the other defendants. So far as was revealed at trial, no promises whatsoever were made as to his sentence, and he correctly understood the maximum to be 5 years and a $10,000 fine.

After his damaging direct testimony, Parker was subjected to several days of intense cross-examination by attorneys for appellant and his co-defendant. One attack on Parker's credibility focused on whether he was motivated by a government promise of favorable treatment. The following occured:

MR. DYMOND: [Attorney for appellant's co-defendant]: "Mr. Parker, am I correct in understanding — you are sitting there under oath now — you are telling me you have no understanding as to the intended dismissal by the Government of the first five counts of this indictment against you?"

MR. PARKER: "I am telling you I have no deal with the Government. I pleaded guilty to a count that carries a five year prison term and $10,000 fine."

MR. DYMOND: "Have you been led to believe by anybody that the remaining counts are going to be dismissed against you?"

MR. PARKER: "I been led by nobody about anything."

MR. DYMOND: "If you don't know what is going to happen to those other five counts, what are you doing testifying?"

MR. PARKER: "My attorney advised me to do this and I did it exactly as he advised me."

MR. DYMOND: "You wouldn't say you are doing this through a sense of rightousness?"

MR. PARKER: "I did it because my attorney advised me to do it as I testified before."

MR. DYMOND: "Did your attorney tell you the remaining five counts were to be dismissed against you?"

MR. PARKER: "My attorney did not."

MR. DYMOND: "Has anybody told you that?"

MR. PARKER: "I don't recall anybody telling me that."

MR. DYMOND: "You don't have any doubt you would recall that if it was told you, do you, Mr. Parker?"

MR. PARKER: "I don't believe I have any doubt."

MR. DYMOND: "Would you definitely and unequivocably state nobody told you these five counts would be dismissed against you?"

MR. PARKER: "No, sir, I have not been told."

THE COURT: "There were no plea bargains made by this Court and I specifically asked Mr. Parker whether anyone connected with the Government, or anyone else, including his attorney, had made any promises, or threats, or inducements, coercion, or anything of that nature, to cause him to enter a plea guilty."

MR. DYMOND: "If the Court please I would like to call on the Government right now to inform the Court whether an agreement has been made to dismiss the remaining five counts against Mr. Parker."

MR. PERKINS: "The answer is 'No'."

MR. DYMOND: "As to whether any suggestion that will be done has been made to the attorneys, to Parker or anyone ese?"

MR. PERKINS: "We haven't talked to Mr. Parker about this matter at all. Mr. Walter is the United States Attorney and he talked to Mr. Parker's counsel about this matter. His name is Winsberg. He had a discussion with him about this case. When I saw Mr. Parker, I saw him in the courtroom when he entered a plea and I didn't have any discussion with him at all."

Were this the end of the affair appellant would clearly be entitled to a new trial under Giglio v. United States, 1972, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104, in which the prosecution's failure to disclose a plea bargain with one of its witnesses was held to be a denial of due process. See also Brady v. Maryland, 1962, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

However, here a recess was held shortly after the quoted testimony, and before trial resumed the judge

was apprised of the bargain. Further, Parker's attorney, Winsberg, was called to testify about the plea bargain, and was not cross-examined by the government. Defense attorneys made no motions for directed verdict or mistrial, and clearly were satisfied to have Winsberg truthfully reveal the bargain to the jury. They subsequently pointed to both the bargain and Parker's disclaimer of it in attacking his credibility. The trial judge twice instructed the jury that inducements to testify are to be considered in determining credibility, and he did so specifically in the context of plea bargaining. Finally, in the prosecution's rebuttal arguments to the jury, the fact of the bargain was tacitly acknowledged.

[9] In these circumstances we cannot conclude that the prosecution's initial lack of candor deprived appellant of due process. We are not, however, favorably impressed by the prosecution's conduct. Initially denying a bargain created confusion that was remedied only after the unnecessary expense and delay of several conferences and the testimony of an out-of-town attorney. The prosecuting attorney explained to both the trial court and this court that he thought he was responding to questions whether he personally had bargained directly with Parker, and whether Parker had been unconditionally promised that the other five counts would be dismissed (whereas their dismissal was conditioned on Parker's truthfully testifying). Without commenting on this explanation, we do express the opinion that it would be preferable for the prosecution to accord more attention to the substance

of the defense's inquiry and less to hair-splitting distinctions.[6]

IV.

[10] This brings us to Parker's recantation of his trial testimony by means of a sworn deposition made in prison after he received the maximum sentence of 5 years and a $10,000 fine.[7] The gist of the deposition is that Parker had been "programmed" by government attorneys to give the testimony they wanted. This was accomplished, says Parker, by repeated threats to prosecute him on the remaining counts in the indictment, and by repeated suggestions that he "really meant" something other than he initially stated and believed to be true. We have carefully studied Parker's deposition. For the most part it establishes no more than that he underwent intensive coaching prior to trial, in order to freeze his testimony, to prevent unexpected responses, and to assure that he would provide critical information in his initial answers and without the necessity of tedious, repretitive pinpoint questioning. This is not improper, so long as the testimony actually given is truthful. In this regard, Parker specifically points to only one area of testimony, that

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[6]We also note, with disapproval, the silence of the second government attorney; unlike the government's principal trial counsel, he had been present when the plea bargain was struck with Parker's attorney.

[7]In January, 1973, Parker testified, to similar effect, at a hearing on his own motion to reduce sentence. It was this subsequent testimony that led to his perjury indictment. This testimony is not a part of the record of appellant's case and has not been considered by this court.

concerning the plea bargain, as having been perjured. He acknowledges that he knew of the deal, and further claims that the government attorneys promised to intercede in his behalf to assure a sentence of no more than three years. In addition he *suggests* that he lied in conformity with prosecution instructions, when he testified that he and appellant had been aware of P.S.C.'s financial plight since 1959 — Parker now claims he initially and truthfully told the government attorneys that this date was 1968, although his deposition is so imprecise that it does not logically exclude the possibility that appellant had the requisite scienter.[8]

[11] As noted above, Parker's deposition is presented as grounds for retrial on two different theories, that of newly discovered evidence and that of prosecutorial misconduct. We first consider the new evidence approach. In this regard we must be mindful that, "motions for a new trial based on recanted testimony of a material witness are looked upon with the utmost suspicion" United States v. Nolte, 5 Cir., 1971, 440 F.2d 1124, 1128, and that, "Testimony which is merely impeaching or cumulative is not a sufficient basis for a new trial based on newly discovered evidence." United States v. Dara, 5 Cir., 1970, 429 F.2d 513, 514. Applying these standards, Parker's revelations about

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[8] In his testimony Parker swore to appellant's knowledge as of 1959 that P.S.C. was not making a profit and was in some sense "insolvent." In the disposition he appears to acknowledge that appellant had long been aware that P.S.C. was profitless but also claims that it was not until 1968 that he and appellant were aware P.S.C. would never be profitable.

his plea bargain are not grounds for a new trial — the substance of the deal was before the jury through the Winsberg testimony, and the claimed promise of a low sentence would have served only as minor additional impeachment of Parker's trial testimony (we note that its credibility had already been heavily attacked by the existence of the deal, by Parker's initial disclaimer of it, and by other inconsistencies developed on cross-examination).

[12] As for the testimony concerning knowledge of P.S.C.'s insolvent condition, we disagree with the trial court's conclusion that Parker's deposition fails to indicate he told a material lie during the trial. While the deposition does not state precisely what testimony Parker considers untruthful, or precisely what his new testimony would be, we think it strongly suggestive of perjured material testimony. We thus find it necessary to remand for a hearing directed to two issues: first, whether Parker's deposition is credible, in light of cross-examination and impeaching testimony from government witnesses, cf. United States v. Nolte, *supra*; and second, precisely what would be his new, credible testimony, if any, and whether it would satisfy the requirements for a new trial based on newly discovered evidence. See United States v. Dara, *supra*; United States v. Jacquillon, 5 Cir., 1972, 469 F.2d 380, 388.

V.

[13] There remains appellant's claim that prosecutorial misconduct justifies a new trial. We have al-

ready dealt with the alleged misconduct of failing immediately to inform the court of Parker's plea bargain. See pp. 1322-1324 *supra*. We now consider the deposition's suggestion of two specific instances of misconduct, to wit, the alleged promise of a low sentence which the prosecution did not reveal, and the prosecution's alleged instigation and tolerance of untrue testimony about appellant's knowledge of P.S.C.'s financial condition. Our guide in this matter is Giglio v. United States, *supra*, and the series of Supreme Court cases discussed therein. The rule is that presentation of known false evidence, and nondisclosure of evidence affecting credibility, are grounds for retrial if the deception was material, that is if it might "in any reasonable likelihood have affected the judgment of the jury." *Giglio, supra*, 405 U.S. at 154, 92 S.Ct. at 766, 31 L.Ed.2d 108. We are unable to say on this record that the deception alleged in Parker's deposition is not material within this definition. Thus it is necessary to remand for an adversary hearing to determine the truth about the prosecution's conduct of this case. Should the trial court determine that misconduct occurred, then it must proceed to determine whether the effect was material within the meaning of *Giglio*.*

In sum, we affirm in all respects save for two particular issues as to which we remand for evidentiary

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*It is not inconsistent to remand to consider the alleged promise of a low sentence in this prosecutorial misconduct context, but not in the context of the newly discovered evidence issue. The standards applicable in each instance are quite different, as should be apparent from a comparison of controlling cases. Compare United States v. Jacquillon, *supra*, with Giglio v. United States, *supra*.

hearing and factual determinations, and save for our directions that the trial court vacate its orders concerning four post-trial motions over which it had no jurisdiction. The first of the remanded issues concerns the possibility that Parker presented perjured material testimony as to appellant's knowledge of P.S.C.'s fianances. The trial court should consider this matter according to the standards governing recanted testimony of prosecution witnesses and retrials based on such newly discovered evidence. Second, the trial court must determine whether the prosecution engaged in misconduct by failing to reveal a promise to Parker of a low sentence, and by instigating and/or tolerating incorrect testimony about appellant's knowledge of P.S.C.'s finances. On this issue, the appropriate standards are those of Giglio v. United States, *supra*.

Affirmed in part, remanded in part with directions.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1418

WALTER H. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that a new trial is required because government counsel personally did not reveal to the jury the full extent of a plea bargain with a critical prosecution witness, although all the conditions of the bargain were disclosed by the witness' lawyer, testifying for the defense.

After a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of securities fraud (counts 1-3), mail fraud (counts 4-5) and conspiracy (count 6), in violation of 15 U.S.C. 77q(a), 18 U.S.C. 1341 and 18 U.S.C. 371. He was sentenced to consecutive terms of imprisonment for five years and cumulative fines of $5,000 on the three securities fraud counts and probation for five years on the remaining three counts. The court of appeals affirmed in part and remanded for a hearing on matters

unrelated to the issue raised in the certiorari petition (Pet. App. A; see p. 8, *infra*, n. 4).

1. The evidence showed that in 1957 co-defendant Charlie Parker organized Professional Service Corporation in New Orleans, Louisiana. Its primary corporate purpose was to collect bills owed to doctors and dentists and to advance to them the amounts owed by patients, less a substantial discount (Tr. 546-769).[1] To generate operating funds, Parker sold "Special Charter Member Contracts," convertible into common stock and carrying an interest rate of ten percent (Tr. 550). Shortly after incorporating, Parker met petitioner, a securities dealer in Monroe, Louisiana. Thereafter, petitioner became a shareholder and director of Professional Service and the primary salesman of the charter member contracts (Tr. 563-564). From that time until mid-1968, when Professional Service was declared bankrupt, petitioner sold more than $4,000,000 of charter member contracts to individuals in the Monroe area and earned over $750,000 in commissions and bonuses (Tr. 564-565).

Petitioner's success in selling the charter member contracts was in large part attributable to his sales presentations and representations made to prospective investors. Petitioner told prospects that the company was sound; that the ten percent return was greater than could be obtained at other financial institutions; and that the corporation would have $2,000,000 left even if it were required to redeem all of the member contracts. Moreover, petitioner invariably displayed literature such as an investors list containing the names of prominent citizens (often without their consent); a

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[1]We are lodging with the Clerk of this Court the four-volume transcript of the trial and sentencing hearing ("Tr.").

letter to the executor of an estate representing that the deceased had invested $50,000 in charter member contracts and had received $47,500 in interest payments during his lifetime and that the estate would soon receive return of the entire principal; and financial statements purporting to show assets of the corporation valued at up to $6,000,000, with substantial growth reflected in each ensuing statement (Tr. 242-253, 355, 363, 426-446, 463-464, 477-479, 488-490, 501-502, 512-515, 536-537, 1017-1018, 1034-1047). Petitioner constantly assured investors who later inquired that their money was in safe hands.

From the outset, Professional Service operated at a loss. The number of clients was minimal and the meager income from financing medical bills never justified interest payments of ten percent on the charter member contracts (Tr. 82-96, 112, 398-399). Nevertheless, Professional Service continued to make the interest payments, using funds received from later sales of other charter member contracts. In addition to this kiting activity, Parker, as chief executive of Professional Service, siphoned off charter member contract income for personal use and for support of a number of other failing enterprises that he headed (Tr. 112-119, 589, 627-631, 653-655). At the time of bankruptcy in 1968, Professional Service owed $4,000,000 to investors and had a liquidated asset value of $100,000 (Tr. 391-393).

Petitioner was closely associated with the operations of Professional Service, had access to its books of accounts, had close ties with Parker, including investments in other ventures, and was responsible for the preparation of much of the paraphernalia used in his sales kit. Parker, testifying for the government,

stated that, in lieu of a profit and loss statement, petitioner urged the preparation of a "Statement of Condition," reflecting the large amount of income flowing to Professional Service, primarily from sales of charter member contracts (Tr. 566). According to Parker, petitioner had inserted statements such as "assets over six million dollars" and "one of Louisiana's fastest growing financial institutions" in materials issued by the company (Tr. 577). Parker testified that petitioner was always aware that the company operated at a loss because Parker had told him so (Tr. 736-737).[2]

In March 1968, another of Parker's corporations, Affiliated Investment, was declared bankrupt following an examination by government auditors. When news of the bankruptcy reached holders of Professional Service charter member contracts, many communicated with petitioner, who continued to assure them that the fall of one of Parker's companies would not affect the continuing success of Professional Service. Some investors asked petitioner to redeem their contracts but were unable to obtain repayment; others, relying upon petitioner's representations that Professional Service was still solvent, continued to retain their contracts (Tr. 262-271, 1019-1020, 1050). Professional Service was declared bankrupt within a few months, and creditors lost about 75 percent of their investments (Tr. 398).

2. As noted, Parker testified at length on behalf of the government, strongly incriminating petitioner. On cross-examination, counsel for co-defendant William

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[2]In his own testimony, petitioner denied having such knowledge and said that he was merely a salesman unaware of the insolvent nature of the company (Tr. 1200, 1204-1290).

Campbell[3] asked Parker about the bargain made with the government in exchange for Parker's cooperation. The witness replied that he had agreed to plead guilty to one of six counts and to give truthful testimony in the trial of his co-defendants. Asked if any arrangement had been made concerning the remaining five counts against him, Parker replied that he knew of no agreement to dismiss those counts (Tr. 918-923; Pet. App. A 8a-10a). To defense counsel's question whether any agreement had been reached as to the remaining counts, government counsel replied, "The answer is 'no'" (Tr. 923). Continuing to remain skeptical that Parker's plea bargain would not include some disposition of the remaining counts, defense counsel pursued the matter further at a conference in the judge's chambers, and received acknowledgements from other government lawyers who had attended the plea-bargaining sessions (the attorney handling the trial had not) that a promise to dismiss the five remaining counts had been made, conditioned upon a plea of guilty to the conspiracy count and the giving of truthful testimony at petitioner's trial (Tr. 942, 948). Parker continued to deny, however, that he had been informed about the proposed dismissal of the other counts (Tr. 961).

Later in the trial defense counsel called Jerome Winsberg, who had served as Parker's attorney during the plea-bargaining sessions. Winsberg disclosed to the jury the details of his negotiations with the government leading to the plea bargain. He stated that he and Parker had gone to the courthouse for a pretrial

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[3]Campbell, the attorney for Professional Service, was tried jointly with petitioner and was acquitted on all six counts. Campbell's trial counsel now represents petitioner.

conference. Parker remained in the hallway while Winsberg discussed a possible plea bargain with the United States Attorney, Mr. Walter, and other government attorneys, including Mr. McIlheran from the Securities and Exchange Commission. Winsberg told the government lawyers that the alternative to a settlement then was a lengthy continuance to allow Parker to obtain new counsel, since Winsberg was becoming a judge and would no longer be able to represent Parker. At a meeting later that same day, which Parker did not attend, Walter agreed that if Parker pled guilty to the conspiracy count, the government would not prosecute the other counts, provided that Parker testified truthfully against his co-defendants. Winsberg said he told all of the terms of the bargain to Parker, who later accepted them. Winsberg thought that he had "made it perfectly clear" to Parker that the government had agreed as part of the plea bargain not to prosecute the remaining counts (Tr. 1066-1086).

Following this testimony (and other unrelated testimony on behalf of the defendants), the defense rested. No motion for mistrial was made based upon the purported misstatement by Parker (Tr. 1455). In closing arguments, defense counsel referred to Winsberg's testimony in their attack upon Parker's credibility (Tr. 1488-1490). The court instructed the jury that the credibility of witnesses was a matter for it to determine and that inducements to testify were to be weighed in resolving issues of credibility (Tr. 1503-1510). Evidently having concluded that Parker was credible, the jury convicted petitioner.

3. Relying upon *Giglio* v. *United States*, 405 U.S. 150, which was decided after the trial in this case, petitioner claims that he was entitled to a new trial

because neither the prosecuting attorney nor Mr. McIlheran from the S.E.C., who was sitting at counsel table, had repudiated Parker's version of the conditions of the plea bargain in the presence of the jury. However, the present case differs significantly from *Giglio*. In *Giglio*, a prosecution witness had testified that he was not informed that he would not be prosecuted thereafter; the jury was never made aware in any manner of the government's promise to the witness that if he testified as a government witness he would not be tried, and the prosecutor stated (erroneously) in summation that the witness had received no promises. Here, the jury heard Parker's own former defense counsel contradict him.

Moreover, McIlheran and other government lawyers were readily available to petitioner to be summoned to testify on this limited question. Having already heard McIlheran and another government lawyer state under oath in chambers that the deals with Parker did include dropping five counts in exchange for a plea of guilty on the sixth count and truthful testimony (Tr. 942, 948), defense counsel could have exploited this discrepancy with Parker had they desired to pursue the matter further after adducing the testimony of Judge Winsberg. Instead, counsel chose to rest on Winsberg's account without the cumulative testimony of the government lawyers (Tr. 1489-1490). In any event, the government attorneys were not in a position to add to Winsberg's testimony as to what he had told Parker about the plea bargain agreement, as distinguished from what had in fact been agreed to by Winsberg and the government attorneys. That there had been an agreement to drop the other five counts was acknowledged in the prosecutor's closing argument (Tr. 1492).

While, as the court of appeals noted (Pet. App. A 11a-12a), the conduct of the government attorneys may have been open to criticism, the prosecution cannot be faulted for the strategic decision of defense counsel to pursue the matter with Parker, or for Parker's continued insistence that he did not recall Winsberg's mentioning of withdrawal of the five counts as part of the plea bargain.

Here, unlike *Giglio*, the jury's resolution of Parker's credibility was with knowledge of the full extent of his inducement to testify favorably for the government. As to this issue, the court of appeals correctly determined that no reversible error had been committed.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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[4]Following this trial, Parker was sentenced to five years' imprisonment and a $10,000 fine, the maximum term. His claim that the conditions of his plea bargain had not been complied with was rejected by the court of appeals. *United States* v. *Parker*, 479 F. 2d 1047 (C.A. 5). After sentencing, Parker filed an affidavit recanting certain of the statements made at petitioner's trial. The district court denied petitioner's motion for a new trial based upon Parker's affidavit. The court of appeals, however, concluded that certain representations in the affidavit required further examination to ascertain whether Parker had committed perjury in stating that petitioner was aware of the finances of Professional Service almost from the outset and whether there was any truth to Parker's allegations that the prosecution knowingly failed to reveal a promise to Parker of a low sentence or allowed false testimony concerning petitioner's knowledge of Professional Service's finances to stand uncorrected at petitioner's trial. On these matters the court of appeals remanded for an evidentiary hearing (Pet. App. A 12a-16a).